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Public Prosecutor v Subbarau @ Kamalanathan

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-06B-55–09 OF 2016
MOHTARUDIN BAKI, VERNON ONG AND HARMINDAR SINGH JJCA
1 AUGUST 2017

C

Criminal Law — Official Secrets Act 1972 — s 8 — Charge of leaking secret official information or secret official document — Communicating information or document via WhatsApp — Whether document official secret

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The respondent and Prem Kumar a/l Padelrangam ('Prem Kumar') were arrested and two handphones, each registered under the respondent and Prem Kumar's name were seized. Several images were found in Prem Kumar's handphone and these images were substantially similar to the actual UPSR question papers for the subjects of Bahasa Tamil Penulisan O37, Science 018/1. Mathematic 035/2, Mathematic 015/1 and Bahasa Tamil Pemahaman 036 ('offending images'). These images were shared via WhatsApp groups including communications from the respondent's telephone. PW12 was appointed by the Minister of Education Malaysia to classify official documents, information and material as official documents and that the UPSR 2014 question papers was classified as 'confidential' by her and she was given a certificate of appointment by the Minister. The respondent was charged with five counts under s 8(1)(c)(iii) of the Official Secrets Act 1972 ('the OSA 1972'). The sessions court decided that the prosecution had failed to establish prima facie case and consequently, the respondent was acquitted and discharge at the close of the prosecution case. The High Court had dismissed the appellant's appeal, hence, the present appeal. The issue to be determined was whether the final 2014 UPSR examination papers pursuant to the five charges were official secrets.

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Held, allowing the appeal; setting aside the orders of sessions court and High Court; and ordering the respondent to enter his defence on the five charges:

(1) **(per Vernon Ong JCA, majority)** A document which has been classified includes any information and material contained in an initial draft of the document, which contents are official secret once the document has been classifies, and the official secret attaches to the any information and material of all subsequent drafts including the final version of the document. To hold otherwise would in effect require a certifying public officer to classify each and every draft of a document including the final

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version of the document. It would lead to further absurdity if the subsequent drafts and final version are not classified individually, then the information and material in the subsequent and final drafts will not fall to be protected as official secret. Thus, it was not necessary to classify each and every draft and the final version of the UPSR examination paper. It was clear that the UPSR examination papers were intended to be classified and that the classification thereof includes the information and material in the initial and subsequent drafts and final version of the UPSR examination papers. Thus, the final UPSR examination papers were official secret (see paras 24–25).

(2) **(per Vernon Ong JCA, majority)** The trial judge and the High Court judge misdirected themselves on the law and on the facts. On the totality of the evidence, there were ample evidence to establish a prima facie case on all the five charges (see para 26).

(3) **(per Harminder Singh JCA, dissenting)** The official secret was the final approved version of the UPSR examination papers and not the other way around as suggested in the majority judgment. It was too much of a stretch to say that it was the 2014 UPSR examination paper that was classified and not the drafts as that was not borne out by the evidence and even in the discredited evidence of PW12. The only reasonable interpretation was that once the final 2014 UPSR examination paper was classified as an official secret, then by definition the initial and subsequent drafts will be deemed to be official secrets. Any other interpretation will be a strained construction put on the words set out in the statute leading to confusion and injustice. The assertion that the interpretation would lead to absurdity as the certifying public officer would have to classify each and every draft is untenable. The law cannot be concerned with the convenience or inconvenience of public officials tasked with carrying out their functions as set out in the law and especially in the case where the liberty of a subject was concerned (see paras 51–53).

[Bahasa Malaysia summary

Responden dan Prem Kumat a/l Padelrangam ('Prem Kumar') telah ditangkap dan dua telefon bimbit, setiap satu telah didaftarkan di bawah nama responden dan Prem Kumar telah dirampas. Beberapa imej telah dijumpai dalam telepon bimbit Prem Kumar dan imej-imej tersebut amat sama dengan kertas soalan UPSR sebenar untuk subjek-subjek Bahasa Tamil Peulisan 037, Sains 018/1, Matematik 035/2, Matematik 015/1 dan Bahasa Tamil Pemahaman 036 ('imej-imej yang dipertuduhkan'). Imej-imej tersebut telah dikongsi melalui grup WhatsApp termasuk komunikasi dari telefon responden. PW12 telah dilantik oleh Menteri Pendidikan Malaysia untuk mengklasifikasikan dokumen, maklumat dan bahan rasmi sebagai dokumen-dokumen tasi dan agar kertas-kertas soalan UPSR 2014 diklasifikasikan sebagai 'confidential' olehnya dan dia diberikan perakuan pelantikan oleh Menteri. Responden telah

dituduh dengan lima pertuduhan di bawah s 8(1)(c)(iii) Akta Rahsia Rasmi 1972 ('ARR 1972'). Mahkamah sesyen memutuskan bahawa pendakwaan telah gagal untuk membuktikan kes prima facie dan akhirnya, responden telah dilepas dan dibebaskan di penutup kes pendakwaan. Mahkamah Tinggi telah menolak rayuan perayu, justeru, rayuan ini. Isu untuk ditentukan adalah sama ada kertas peperiksaan UPSR 2014 yang terakhir menurut lima pertuduhan tersebut adlah rahsia rasmi.

Diputuskan, membenarkan rayuan; mengetepikan perintah-perintah mahkamah sesyen dan Mahkamah Tinggi; dan memerintahkan responden memasuki pembelaannya lima pertuduhan tersebut:

(1) **(oleh Vernon Ong HMR, majoriti)** Suatu dokumen yang telah diklasifikasikan termasuklah apa-apa maklumat dan bahan yang terkandung dalam draf awal dokumen tersebut, yang mana kandungannya adalah rahsia rasmi selepas dokumen tersebut diklasifikasikan, dan rahsia rasmi yang berkait dengan apa-apa maklumat dan bahan semua draf seterusnya termasuklah versi terakhir dokumen tersebut. Untuk memutuskan sebaliknya akan memerlukan pegawai awam yang mengesahkan untuk mengklasifikasikan setiap draf dokumen termasuk versi akhir dokumen itu. Ini merupakan suatu yang mustahil selanjutnya jika draf dan versi akhir tidak diklasifikasikan secara berasingan, maka maklumat dan bahan dalam draf berikutnya dan akhir tidak akan dilindungi sebagai rahsia rasmi. Oleh itu, ia tidak pelru untuk diklasifikasikan setiap versi kertas peperiksaan UPSR. Adalah jelas bahawa kerta peperiksaan UPSR bertujuan untuk diklasifikasikan dan bahawa pengklasifikasian tersebut termasuklah maklumat dan bahan dalam draf awal dan berikutnya dan versi terakhir kertas peperiksaan UPSR. Oleh itu, kertas UPSR yang terakhir adalah rahsia rasmi (lihat perenggan 24–25).

(2) **(oleh Vernon Ong HMR, majoriti)** Hakim perbicaraan dan hakim Mahkamah Tinggi telah salah arah dari segi undang-undang dan fakta. Berdasarkan keseluruhan keterangan, terdapat keterangan yang mecukupi untuk membuktikan kes prima facie ke atas semua lima pertuduhan tersebut (lihat perenggan 26).

(3) **(oleh Harminder Singh HMR, menentang)** Rahsia rasmi adalah versi akhir kertas pemeriksaan UPSR yang diluluskan dan bukan sebaliknya seperti yang dicadangkan di dalam penghakiman majoriti. Ia adalah terlalu jauh melangkau untuk menyatakan bahawa ia adalah kertas peperiksaan UPSR 2014 yang diklasifikasikan sebagai rahsia rasmi dan bukan draf-draf kerana ini tidak dibuktikan oleh keterangan dan juga di dalam keterangan PW12 yang tidak boleh diharap. Satu-satunya tafsiran yang munasabah adalah sebaik sahaja kertas pemeriksaan 2014 terakhir diklasifikasikan sebagai rahsia rasmi, dengan itu mengikut definisi draf

permulaan dan seterusnya akan dianggap rahsia rasmi. Tafsiran yang lain akan menjadi tafsiran tidak sesuai yang dikenakan ke atas perkataan-perkataan yang ditetapkan di dalam statut yang membawa kepada kekeliruan dan ketidakadilan. Penegasan bahawa tafsiran akan membawa kepada tidak masuk akal kerana pegawai awam yang mengesahkan perlu untuk mengklasifikasikan setiap satu draf adalah tidak boleh dipertahankan. Undang-undang tidak boleh terlibat dengan kemudahan atau kesusahan pegawai kerajaan yang ditugaskan dengan menjalankan fungsi mereka seperti yang ditetapkan oleh undang-undang dan terutamanya di dalam kes di mana kebebasan subjek adalah dipentingkan (see paras 51–53).]

Notes

For cases on s 8, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1965.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Barnard v Gorman [1941] AC 378, HL (refd)
Datuk Haji Dzulkifli bin Datuk Abdul Hamid v PP [1981] 1 MLJ 112; [1980] 1 LNS 91, HL (refd)
Frederick Tan Im Kian v PP [1986] 2 MLJ 279; [1986] 1 LNS 104 (refd)
Khairuddin bin Hassan v PP [2010] 6 MLJ 145; [2010] 7 CLJ 129 (refd)
Lee Weng Fatt v PP [2015] 2 MLJ 683; [2014] 1 LNS 1270, CA (refd)
Liversidge v Anderson [1942] AC 206, HL (refd)
Mohammad Ezam Mohd Nor v PP [2004] 2 CLJ 595, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (folld)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Hoo Chee Keong [1997] 4 MLJ 451, HC (refd)
Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201, FC (refd)

Legislation referred to

Evidence Act 1950 ss 3, 8, 74, 78(1)(a)(ii), (1)(a)(iii), 114(g)
Interpretation Acts 1948 and 1967 s 3
Official Secrets Act 1972 ss 2, 2B, 8(1), (1)(c)(iii), 16A
Penal Code s 29

Appeal from: Criminal Appeal Nos 42LB(A)-21 and 22–04 of 2015 (High Court, Seremban)

Awang Armadajaya Awang Mahmud (Ahmad Terrirudin Mohd Salleh, Nadia Hanim Mohd Tajuddin, Norinna Bahadun and Muhammad Azmi Mashud with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
M Kula Segaran (Kula & Assoc) for the respondent.

Vernon Ong JCA (delivering majority judgment of the court):

INTRODUCTION

[1] The prosecution's appeal relates to the decision of the High Court dismissing the prosecution's appeal against the decision of the sessions court in acquitting and discharging the respondent at the close of the prosecution case.

[2] After hearing of submission, we heard and allowed the appeal by a majority decision, with my learned brother Justice Mohtarudin Baki and I being in the majority whilst our learned brother Justice Harmindar Singh Dhaliwal dissented. This then is our majority judgment.

[3] The respondent was charged with five counts under s 8(1)(c)(iii) of the Official Secrets Act 1972 ('the OSA 1972') with having possession in his Samsung Galaxy Note 2 smartphone between 9 September 2014 to 16 September 2014 the following documents, to wit:

(i) 'kertas soalan Bahasa Tamil-Penulisan 037 Ujian Penilaian Sekolah Rendah 2014';

(ii) 'kertas soalan sains 018/1 Ujian Penilaian Sekolah Rendah 2014';

(iii) 'kertas soalan Matematik 035/2 Ujian Penilaian Sekolah Rendah 2014';

(iv) 'kertas soalan Matematik 015/1 Ujian Penilaian Sekolah Rendah 2014'; and

(v) 'kertas soalan Bahasa Tamil — Pemahaman Ujian Penilaian Sekolah Rendah 2014'.

(referred to collectively as '2014 UPSR examination papers')

THE SALIENT FACTS

[4] The brief facts as found by the sessions court judge is as follows:

(a) upon being informed by PW11 and upon making comparisons PW12 made a police report on the leakage of the UPSR 2014 Science question paper on 10 September 2014 (exh P32);

(b) investigations were conducted by PW15 and the accused was arrested by PW1 on 16 September 2014 at his house nombor No 591, Jalan Bukit Gelena 13, Taman Bukit Galena, Fasa 4, Negeri Sembilan. A 'Samsung Note 2' handphone (exh P2) was seized from the accused. The arrest and seizure report is produced as Exhibit p1. PW9 confirmed that the telephone number 0102250064 is registered under the accused name;

(c) one Prem Kumar a/l Padelrangam (Prem Kumar) was arrested by PW4 and a IPhone (exh P8) was seized from him. PW8 confirmed that telephone number 0125794650 was registered under Prem Kumar's name;

(d) PW3 had examined the accused's handphone (P2) and found one image in P2. At the outset it must however be pointed out that this image is not the subject matter of any of the charges against the accused. PW3's report is marked as exh P22;

(e) PW3 had also examined Prem Kumar's handphone (P8) and found that the images in P8 (offending images in P8) were substantially similar to the following actual UPSR question papers:

(i) Bahasa Tamil Penulisan O37 (exh P19);

(ii) Science 018/1 (exh P20);

(iii) Mathematic 035/2 (exh P17);

(iv) Mathematic 015/1 (exh P16); and

(v) Bahasa Tamil Pemahaman 036 (exh P18);

(f) according to PW3 the images in P8 were shared by WhatsApp groups and there were 3 WhatsApp communications, including communications from the accused's telephone. PW3's report on P8 is marked as Exhibit P21. Prem Kumar, a vital prosecution's witness was not called to testify in this trial;

(g) according to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential' (Sulit) by her and registered in the Buku Daftar Rahsia Rasmi (exh P31). The certificate of appointment by the Minister was produced and after strong objections by the learned defence counsel was marked as ID29; and

(h) according to the UPSR Time table (exh P30):

(i) Bahasa Tamil penulisan 037 was scheduled on 10 September 2014 from 12.15 noon to 1.30pm;

(ii) Science 018/1 was scheduled on 11 September 2014 from 8.15am to 9.15am;

(iii) Mathematics 035/2 was scheduled on 9 September 2014 from 12.20 noon to 1pm;

(iv) Mathematics 015/1 was scheduled on 10 September 2014 from 8.15am to 9.15am; and

(v) Bahasa Tamil pemahaman 036 was scheduled on 10 September 2014 from 10.30am to 11.20am.

DECISION OF THE SESSIONS COURT JUDGE

[5] The sessions court judge ('trial judge') found that the prosecution had failed to establish a prima facie case in respect of all the charges against the respondent. The following were, inter alia, the basis of the trial judge's findings:

(a) the prosecution failed to prove the documents specified in the charges (exhs P16–P20) are official secret;

(b) the classification of the 2014 UPSR examination papers as official secret by PW12 is null and void and of no effect as PW12's appointment is not in accordance with s 2B of the OSA 1972;

(c) the appointment certificate of PW12 (ID29) by the Minister of Education is not authenticated and therefore inadmissible;

(d) that PW12 was not a reliable and credible witness;

(e) that the non-calling of the Minister who issued ID29 is fatal to the prosecution's case and therefore adverse presumption under s 114(g) of the Evidence Act 1950 is invoked;

(f) that the prosecution failed to prove that the respondent had physical possession of exhs P16–P20 question papers;

(g) that the respondent did not have the prerequisite knowledge (mens rea) nor was he in a position to acquire any knowledge that the offending images in P8 were linked to the 2014 UPSR examination papers; and

(h) that there is no evidence to show that the respondent had 'obtained' the exhs P16–P20 question papers as per the offending images in P8 and had 'retained' them in contravention of the OSA 1972.

[6] On appeal, the High Court concurred with the findings of the trial judge, hence the prosecutions appeal to this court.

SUBMISSION OF COUNSEL

[7] Learned DPP submitted on two main issues. The first related to the question of whether PW12 is a person who is empowered to classify documents as official secret. The second issue relates to the elements of the offence under s 8(1) of the OSA 1972.

[8] On the first issue, learned DPP argued that PW12 is a public officer designated as the director of the Malaysian Examination Board ('MEB'). As such, PW12 is a person charged with responsibility of examinations in Malaysia within the meaning of s 16A of the OSA 1972. PW12 is directly empowered to regularise all affairs pertaining to examination and examination

papers nationwide. Therefore, as mandated by s 16A, even without appointment as a 'classifying officer', PW12 can in her very capacity as the director of the MEB certify documents as official secret.

[9] Insofar as the certificate of appointment (exh ID29) appointing PW12 by the then Education Minister is concerned, learned DPP argued that ID29 is a public document by virtue of s 74 read together with s 78(1)(a)(ii) and (iii) of the Evidence Act 1950 renders ID29 a public document whereby the need to call the maker is dispensed with (*Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451 and *Syarikat Jengka Sdn Bhd v Abdul Rashid Bin Harun* [1981] 1 MLJ 201 (FC)).

[10] On the second issue, learned DPP argued that there are four elements of the offence under s 8(1) of the OSA 1972. First, that the documents specified in the charges are official secret. Second, the respondent has in his possession the offending documents. Third, the offending documents were obtained by the respondent in contravention of the OSA 1972. And, fourth the respondent retained the offending documents when he had no right to retain them.

[11] The documents forming the subject matter of the charges are in the form of WhatsApp images in Prem Kumar's handphone P8. The evidence of SP3 and SP4 together with the data analysis ('exh P21') made by SKMM confirm that the offending images found in P8 was sent to 'MHS Ipoh WhatsApp Group' from the respondent's handphone P2. SP3 who conducted an analysis found that the WhatsApp conversations contained 67 images comprising of pages of the documents particularised in the five charges. The images were identified and marked as the following exhibits:

P16 – 15 images of Kertas Matematik 015/1

P17 – 10 images of Kertas Matematik 035/2

P18 – 22 images of Kertas Bahasa Tamil Pemahaman 036

P19 – 4 images of Kertas Bahasa Tamil Penulisan 037

P20 – 16 images of Kertas Sains 018

[12] Learned DPP argued that even though none of the offending images were found in the handphone of the respondent, the evidence clearly shows that all 67 images came from one source ie the respondent's handphone. The evidence of SP9 further confirmed that handphone Nos 010-2250064 and 012-5794650 were registered under the respondent's and Prem Kumar's names respectively. As such, it was argued that there is a strong nexus implicating the respondent (*Lee Weng Fatt v Public Prosecutor* [2015] 2 MLJ 683; [2014] 1 LNS 1270).

[13] Learned DPP also argued that it can be inferred that the respondent had prerequisite knowledge and thus mens rea possession of the offending images before sending it to Prem Kumar because: (a) the images were obtained and retained by the respondent and are identical to the actual UPSR 2014 examination papers; (b) the images were sent over a period of two days; (c) the images were sent on 9 September 2014 and 10 September 2014 which was just prior to the UPSR examination dates; and (d) the conduct of the respondent deleting the images in his handphone. As such, the respondent has the duty to explain his conduct (s 8 of the Evidence Act 1950; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145; [2010] 7 CLJ 129). Further, the respondent cannot avail himself as an innocent recipient (*Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112; [1980] 1 LNS 91; *Frederick Tan Im Kian v Public Prosecutor* [1986] 2 MLJ 279; [1986] 1 LNS 104). Accordingly, it was argued that the element of 'obtaining' and retaining are closely linked tot fact that the respondent has had possession of the images of the examination papers. As such, the trial judge erred in holding that the prosecution has failed to prove that the respondent had knowledge of the existence of the images or had possession of the same. The offence was committed by the respondent at the material time when he had in his possession the images he had obtained in contravention of the OSA 1972 and retained it in his handphone and subsequently sending the images via WhatsApp group knowingly that it was the UPSR examination papers. SP3 the forensic analyst from SKMM explained that the fact that none of the images were found in the respondent's handphone could be due to the images being deleted and thereafter overridden so that there is nothing left to extract in the handphone. As such, the fact that nothing was found in the respondent's handphone does not negate the fact that the single source of the images came from the respondent's handphone.

[14] The main points taken by learned counsel for the respondent are as follows. First, the certificate of appointment ID29 is inadmissible because it was not signed by the Minister. As such, the adverse inference under s 114(g) should be invoked for the failure to call the Minster or the special officer of the Minister. Further, as ID29 was not *gazetted*, the court cannot take judicial notice of ID29.

[15] Second, the documents classified by PW12 as official secret according to the register of official secret ('exh P31') were only drafts of the UPSR examination papers and not the final UPSR examination papers. PW12 did not give any explanation as to why there were additional signatures affixed on the register.

[16] Third, there is a gap in the prosecution case because Prem Kumar was

an important witness and he was not called to testify (*Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 (SC)). Further, there is no evidence to show that the respondent had possession of the images

[17] Lastly, learned counsel argued that s 16A is inconsistent with the interpretation of official secret in s 2 of the OSA 1972 and that as such s 16A is obnoxious, draconian and oppressive. Therefore, he argued s 16A, is void to the extent of the inconsistency (*Mohammad Ezam Mohd Nor v Public Prosecutor* [2004] 2 CLJ 595).

DECISION

[18] Upon a perusal of the appeal record and after hearing of submission of counsel, we are in agreement with the submission of learned DPP. We of the considered view that the only real issue before the court relates to the question of whether the final 2014 UPSR examination papers pursuant to the five charges are official secret. The point taken by counsel is that only the drafts of the UPSR examination papers were classified by PW12. In fact, this point was taken by the trial judge in the following words at para 43 of the trial judge's written judgment which is as follows:

> 43. It is needless to say that the date when Exhibits P16 to 20 were classified is very pertinent to the charge. *Exhibits P16 to 20 are certainly not the first version* (sic) that were sent to the printers for printing as admitted by PW12. Each amended copy would necessarily give birth to a fresh document and would require a fresh classification under the OSA in order to be protected as official secret. *In this case the prosecution has failed to establish on a prima facie evidence that the final amended question papers in the form of Exhibits P16 to 20 were classified as official secret before the dates specified in the charge against the accused*. (Emphasis added.)

[19] The words 'official secret' and 'document' are defined under s 2 of the OSA 1972 as follows:

> '*official secret*' means any document specified in the Schedule and *any information and material relating thereto* and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret'. 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s 2B;
>
> '*document*' includes, in addition to a document in writing and part of a document —
>
> (a) any map, plan, model, graph or drawing;
>
> (b) any photograph;

(c) any disc, tape, sound track or other device in which sound or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other component) of being reproduced therefrom; and

(d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

[20] The word 'document' is also defined to denote any matter expressed or described upon any substance by means of letters figures of marks, or by more than one of those means, intended to be used, or which may be used, as evidence for that matter (s 29 of the Penal Code; s 3 of the Evidence Act 1950; s 3 of the Interpretation Acts 1948 and 1967).

[21] According to the 'Daftar Suratan Rahsia Rasmi Di Luar Jadual Akta Rahsia Rasmi 1972 Dan Berhubungan Dengannya Yang Dikelaskan' (exh P31) the documents in question were classified by PW12 in the following format:

Bil.	Tarikh Surat	Rujukan Surat	Perkara	Pengelasan	Dikelaskan Oleh	Tandatangan	Catatan
...	...	...	...	...	...	...	...
		UPSR 2014					
...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...
543	1.7.2014	015/1	Mathematics 2 SK (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...
545	8.7.2014	018	Science SK (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...

548	8.7.2014	035/2(P.P.)	P.P Mathematics 2 SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...	...	...	...	...	...	...	...
568	22.7.2014	036	Bahasa Tamil Pemahaman SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
569	22.7.2014	037	Bahasa Tamil Penulisan SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...	...	...	...	...	...	...	...
574	22.7.2014	037 (P/P)	P.I. Bahasa Tamil Penulisan SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...	...	...	...	...	...	...	...

[22] In our view, as the documents in question is the 2014 UPSR examination paper, it is the 2014 UPSR examination paper that were classified and not the draft or the paper on which it is created. For instance, when PW12 classified the document described as Mathematics 035/2 examination paper on 1 July 2014, it was the Mathematics 035/2 examination paper which was classified. We say this in the light of the meaning ascribed to the words 'official secret' includes 'any information and material relating thereto'. Any information and material relating to the said Mathematics 035/2 examination paper would include the information and material contained in all initial and subsequent drafts of the said examination paper and the final version of the examination paper.

[23] In the ordinary course of work, the making of a document begins with the creation of an initial draft containing such information and material relating to the document in question. In the case of the initial draft for the Mathematics examination paper for instance, the initial draft would contain instructions, mathematics questions graphs, drawings and other material. Any revisions or amendments to the instructions, questions and materials in the initial draft and subsequent drafts would relate to the Mathematics examination paper — ie such information and material relating thereto.

[24] Accordingly, we hold that a document which has been classified includes any information and material contained in an initial draft of the document, which contents are official secret once the document has been classified, and the official secret attaches to the any information and material of all subsequent drafts including the final version of the document.

[25] To hold otherwise would lead to absurdity as it would in effect require a certifying public officer to classify each and every draft of a document including the final version of the document. It would lead to the further absurdity that if the subsequent drafts and final version are not classified individually, then the information and material in the subsequent and final drafts will not fall to be protected as official secret. Therefore, we do not think that it is necessary for PW12 to classify each and every draft and the final version of the UPSR examination paper. On the established facts, it is clear that PW12 intended to classify the UPSR examination papers and that the classification thereof includes the information and material in the initial and subsequent drafts and final version of the UPSR examination papers. As such, we hold that the final UPSR examination papers in question are official secret.

[26] We are therefore constrained to hold that the trial judge and High Court judge misdirected themselves on the law and on the facts. On the totality of the evidence, we agree with submission of learned DPP that there is ample evidence to establish a prima facie case on all the five charges.

[27] For the foregoing reasons, we set aside the orders of the High Court and the sessions court and ordered the respondent to enter on his defence on the five charges.

Harmindar Singh JCA (delivering dissenting judgment of the court):

[28] The respondent faced five charges in the Sessions Court at Seremban for offences under s 8(1)(c)(iii) of the Official Secrets Act 1972 ('the OSA 1972'). The charges related to possession in his Samsung Galaxy Note 2 smartphone of the following ('2014 UPSR examination papers'):

(i) 'Kertas soalan Bahasa Tamil — Penulisan 037 Ujian Penilaian Sekolah Rendah 2014';

(ii) 'Kertas soalan sains 018/1 Penulisan 037 Ujian Penilaian Sekolah Rendah 2014';

(iii) 'Kertas soalan Matematik 035/2 Ujian Penilaian Sekolah Rendah 2014';

(iv) 'Kertas soalan Matematik 015/1 Ujian Penilaian Sekolah Rendah 2014'; and

(v) 'Kertas soalan Bahasa Tamil — Pemahaman Ujian Penilaian Sekolah Rendah 2014'.

[29] After a trial, and at the end of the prosecution case, the respondent was acquitted and discharged on all the five charges by the sessions court on 16 April 2015. The prosecution then appealed to the Seremban High Court. On 5 September 2016, the High Court dismissed the appeal and affirmed the decision of the sessio'ns court.

[30] Being dissatisfied, the public prosecutor filed an appeal against that decision to this court. The appeal was heard on 12 April 2017 and adjourned for decision. On 25 May 2017, the appeal was allowed by a majority decision. Although I was in agreement with my learned brothers on all the issues raised, I had, with respect, serious reservations on the question of whether the documents forming the subject matter of the charge had been properly classified as official secrets. I am therefore compelled to provide reasons for my dissenting view which now follow.

THE RELEVANT FACTS

[31] The factual matrix of the case falls within a narrow compass. Sometime in September 2014, the nation was jolted by the disclosure that examination papers for the Ujian Pencapaian Sekolah Rendah ('UPSR') had been leaked to members of the public. There was much further outcry when the pupils involved, namely year six pupils throughout the country, had to resit the five leaked papers.

[32] Swift investigations by the police resulted in the arrest of several teachers. One of the teachers was the respondent. PW12, the Director of the Malaysian Examination Board, on being informed of the leakage, made a police report on the leakage of the UPSR 2014 Science question paper on 10 September 2014. Investigations were conducted by PW15, a police officer, and the respondent was arrested by PW1, a police officer, on 16 September 2014 at his house No 591, Jalan Bukit Gelena 13, Taman Bukit Galena, Fasa 4, Negeri Sembilan. A Samsung Note 2 handphone (exh P2) was seized from the

respondent. It was confirmed that the telephone No 0102250064 was registered under the respondent's name.

[33] Subsequently, one Prem Kumar a/l Padelrangam ('Prem Kumar') was arrested by PW4, a police officer, and an i-Phone handphone (exh P8) was seized from him. It was confirmed that telephone No 0125794650 was registered under Prem Kumar's name. It also transpired that PW3, a forensic analyst, had examined the respondent's handphone (exh P2) and found one image in the said phone. This image, however, was not the subject matter of any of the charges against the respondent.

[34] PW3 had also examined Prem Kumar's handphone (exh P8) and found that the images in P8 were substantially similar to the following actual UPSR question papers:

(a) Bahasa Tamil Penulisan 037 (exh P19);

(b) Science 018/1 (exh P20);

(c) Mathematics 035/2 (exh P17);

(d) Mathematics 015/1 (exh P16); and

(e) Bahasa Tamil Pemahaman 036 (exh P18).

[35] According to PW3, the offending images in P8 were shared by WhatsApp groups and there were three WhatsApp communications, including communications from the respondent's handphone. PW3 had prepared a report marked as exh P21.

[36] According to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential' (sulit) by her and registered in the Buku Daftar Rahsia Rasmi (exh P31). The certificate of appointment by the Minister was produced and, after strong objections by the learned defence counsel, was marked as ID29.

[37] According to the UPSR timetable (exh P30), the Bahasa Tamil Penulisan 037 examination was scheduled on 10 September 2014 from 12.15 noon to 1.30pm; the Science 018/1 examination was scheduled on 11 September 2014 from 8.15am to 9.15am; the Mathematics 035/2 examination was scheduled on 9 September from 12.20 noon to 1.00pm; the Mathematics 015/1 examination was scheduled on 10 September 2015 from 8.15am to 9.15am; and the Bahasa Tamil Pemahaman 036 examination was scheduled on 10 September 2014 from 10.30am to 11.20am.

A FINDINGS BY THE TRIAL COURT

[38] At the end of the prosecution case, the learned trial judge acquitted the respondent. The learned trial judge found that the prosecution had failed to prove a prima facie case against the respondent on all the charges. The basis of the trial judge's findings have been summarised by my learned brother Justice Vernon Ong in the majority judgment and no useful purpose would be served to reproduce the same. Suffice it to say, that among the reasons given, and which will form the basis of this judgment, it was held that the prosecution had failed to prove that the documents specified in the charges are official secrets.

THE INSTANT APPEAL

[39] Before us, the learned DPP for the appellant submitted at length to persuade the court that the trial court had fallen into error when acquitting the respondent without his defence being called. It was further submitted that the High Court sitting on appeal was also wrong in affirming that decision.

[40] I should state at the outset that I have no quarrel with the decision by the majority with respect to all the issues raised except for one. As I had mentioned earlier, the issue with which I had to respectfully part company with my learned brother judges is whether the final 2014 UPSR examination papers which formed the subject matter of the charge were official secrets.

[41] In this respect, it was the finding of the learned sessions judge that only the draft of the UPSR papers were classified by PW12 and not the finalised papers. The learned judge duly noted the process adopted in preparing the final papers at para 42 of the judgment as follows:

> 42. After making amendments, modifications and change it is then sent back to the printers. This process can be repeated over several times until the final draft is approved and sent for printing. PW12 cannot now explain how many times this process took for P16 to 20. PW12 also cannot recall the date of final approval of the said paper. She is unable to confirm when the final approval of exhs P16 to 20 were classified as official secret. Nonetheless, she pointed out her second signatures in exh P31 is to signify that the examination papers were amended. PW12 however cannot remember when she signed it as her signatures were undated. It was not surprising therefore for the learned defence counsel to challenge the date of the second signature signifying the actual date exhs P16 to 20 were classified as official secret. Learned defence counsel even suggested that PW12 only placed her second signature after the leakage of the examination fiasco was exposed and when it was found that the final amended approved examination papers were not properly classified before the 2014 UPSR examination. PW12 denied. Coincidentally, PW12's second signature is found only on the leaked examination papers giving rise to reasonable doubts and suspicions as to whether P16 to 20 were in fact actually

classified before the 2014 UPSR examination. She did not appear confident. I did not find her truthful on this issue. In any event no copies of the first draft or subsequent amended drafts that were classified as official secret by PW12 were produced by PW12 to prove the date of birth of exhs P16 to 20.

[42] Having made this finding, the learned judge then went on to make the following conclusion in the next paragraph of the judgment:

43. It is needless to say that the date when exhs P16 to 20 were classified is very pertinent to the charge. Exhibits P16 to 20 are certainly not the first version that were sent to the printers for printing as admitted by PW12. Each amended copy would necessarily give birth to a fresh document and would require a fresh classification under the OSA in order to be protected as official secret. In this case the prosecution has failed to establish on a prima facie evidence that the final amended question papers in the form of exhs P16 to 20 were classified as official secret before the dates specified in the charge against the accused.

[43] In this respect, the High Court accepted these findings when it was held at para 35 of the judgment:

[35] Mahkamah ini telah meneliti alasan penghakiman hakim mahkamah sesyen yang bijaksana dan mendapati bahawa Hakim Mahkamah Sesyen telah meneliti keterangan secara keseluruhan dan menganalisa setiap isu di hadapannya dengan secara mendalam berdasarkan prinsip undang-undang yang mana mahkamah ini dapati tidak ada sebab untuk menganggu dapatan tersebut dan mahkamah ini tidak perlu campur tangan kerana mahkamah ini bersetuju dengan dapatan oleh hakim mahkamah sesyen yang bijaksana.

[44] Coming back to the charges faced by the respondent, it was common ground that the prosecution had to prove the following for an offence under s 8(1) of the OSA 1972:

(a) the documents specified in the charges namely the 2014 UPSR examination papers ('the offending documents') are official secrets;

(b) the respondent had in his possession the said offending documents;

(c) the said offending documents were obtained by the respondent in contravention of OSA; and

(d) the respondent had retained the said offending documents when he had no right to retain them.

[45] As the issue here is with respect to whether the documents specified in the charges were official secrets, the starting point in this connection must be the definition of 'official secret' in s 2 of the OSA 1972 where it is stated: 'official secret' means any document specified in the Schedule and any information and material relating thereto and includes any other official

document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s 2B.

[46] Now, in the instant case, it cannot be argued otherwise that the final version of the examination papers were not classified as official secret although each one of the draft papers were so classified. It is of course curious in the least as to why so much effort went into classifying the draft copies but not the all-important final copy. It was in evidence that the final copy may be different from the earlier draft copies as several amendments were made to the drafts as conceded by PW12. The irresistible inference is that this non-classification was an oversight by PW12.

[47] In fact, the evidence of PW12 in this context was considered by the trial judge as unreliable and the learned judge went so far as to find that PW12 was 'untruthful on this issue'. Hence the learned judge took the view that each amended copy ought to be classified as official secret and since no evidence was adduced to show that the final copy was so classified, the prosecution has failed to establish a prima facie case.

[48] The prosecution, in this appeal, are, however, relying on the definition of 'official secret' as set out earlier to assert that the final copy of the examination papers was information and material relating to the draft copies which were classified. This submission has found favour with the majority here in that their view is that there was no need for PW12 to classify each and every draft and the final UPSR examination papers as the classification thereof included the information and material in the initial and subsequent drafts and final version of the UPSR examination papers.

[49] With respect, it is trite law that a penal provision which carries grave consequences in the event of its transgression, must be construed strictly. The duty of the courts is plain. We must not give the statutory provision a wider meaning merely because a narrower construction would be inconvenient to the prosecution or the state (see *Barnard v Gorman* [1941] AC 378 and *Liversidge v Anderson* [1942] AC 206).

[50] The leading local authority for this proposition is the Federal Court decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 where the salutary observations of Chong Siew Fai CJ (Sabah and Sarawak), in how a penal statute ought to be construed, are most instructive at p 189:

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss (d) and (da) of s 37 of the Act, being penal provisions, must be strictly

construed, and must not be extended beyond their clear meaning. *Liew Sai Wah v Public Prosecutor* [1968] 2 MLJ 1 (PC); *Public Prosecutor v Leong Kuai Hong* [1981] 1 MLJ 246 (FC). See also *Stenhenson v Higginson* (1851) 3 HL Cas 638 where Lord Truro observed (p 686):

> ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

And in *R v Cuthbertson and other appeals* [1980] 2 All ER 401 (HL) where a forfeiture provision in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed (p 404):

> The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.

The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two sub-sections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, and they are not clear, and if one interpretation is more favourable to the accused than the other, the court will adopt the one more favourable to the accused.

[51] Reverting to the instant appeal, the phrase 'and any information and material relating thereto' in the definition of 'official secret' in s 2 the of OSA 1972 must mean, in my view, the information and material relating to the document sought to be the official secret. In the present case, the official secret is the final approved version of the UPSR examination papers and information and material relating thereto would include the draft papers and not the other way around as suggested in the majority judgment. It would also be too much of a stretch to say that it was the 2014 UPSR examination paper that was classified and not the drafts as that is not borne out by the evidence and even in the discredited evidence of PW12.

[52] The only reasonable interpretation is that once the final 2014 UPSR examination paper is classified as official secret, then by the definition the initial and subsequent drafts will be deemed to be official secret. Any other interpretation would be a strained construction put on the words set out in the statute leading to confusion and injustice. The fear is that ordinary members of the public may be misled and then imprisoned through such a strained construction.

[53] With respect, the assertion that this interpretation would lead to absurdity as the certifying public officer would have to classify each and every draft is untenable. As mentioned earlier, the drafts will become official secrets once the final copy is classified as official secret. If the drafts are needed to be classified as official secret, then it becomes necessary to classify each and every

draft as official secret. In any case, it cannot be overemphasised that the law cannot be concerned with the convenience or inconvenience of public officials tasked with carrying out their functions as set out in the law and especially in the case where the liberty of a subject is concerned. In the present case, an infringement of s 8 of the OSA 1972 may result in imprisonment. Inconvenience did not appear to be an issue for PW12 as she was all along able to classify the drafts. It turned out that she probably overlooked classifying the final approved document.

CONCLUSION

[54] In the circumstances, and for the reasons mentioned, I found no reason to disagree with the decision of the courts below. The appeal is, accordingly, dismissed.

Appeal allowed; orders of sessions court and high court set aside; and respondent ordered to enter his defence on the five charges.

Reported by Jacqueleen Kho